

## **CONCURRENT WORKSHOP: CIVIL PROCEDURE**

**By:**

Helen Hershkoff  
New York University

### **I. Introduction**

Many professors may want to introduce transnational themes into a first-year civil procedure course but hesitate for lack of appropriate English-language materials. In this talk I offer concrete suggestions for introducing a transnational perspective into a first-year civil procedure course using readily-available sources.

First, I describe a forthcoming book of edited readings that is designed specifically to complement conventional civil procedure courses regardless of the number of course hours, the casebook used, or the professor's teaching style.

Second, I enlist examples of cases and law review articles in a traditional casebook, Friedenthal, Miller, Sexton, and Hershkoff, *Civil Procedure: Cases and Materials* Ninth Edition (Thompson-West, 2005), as a way to introduce a transnational perspective without assigning any supplementary materials.

Finally, I focus on the doctrine of *forum non conveniens* as a terrific opportunity to emphasize transnational themes. The topic goes hand-in-hand with human rights and corporate accountability in a global economy, two issues of broad student appeal.

### **II. Civil Procedure in a Global Context (Thomson-West, forthcoming 2006/07)**

- A. Authors: Oscar G. Chase (New York University School of Law); Helen Hershkoff (New York University School of Law); Linda B. Silberman (New York University School of Law); Yasuhei Taniguchi (Emeritus, Kyoto University); Vincenzo Varano (University of Florence); Adrian A.S. Zuckerman (University College, Oxford University)
- B. Purpose: The book consists of edited readings that would introduce students and lawyers to the varieties of litigation systems in use in different modern states.
- C. Format: The book opens with an essay describing the principal differences among the major civil litigation systems. The balance of the book consists of edited readings (including law review articles, judicial opinions, and

statutory and code provisions) plus brief editorial comments and questions to give the read a context. The book will be keyed to available U.S. civil procedure casebooks.

D. Topics: Materials focus on

- The Structure of the Legal Profession
- Court Organization and the Judiciary
- Initiating a Lawsuit and Defining the Issues
- Authority and Process in the First Instance Court
- Short-Cuts to Judgment and Provisional Remedies
- Appeals
- The Role of Constitutional and Supranational Courts
- Preclusion and Finality
- Aggregation of Claims and Parties
- Transnational Litigation
- Procedural Harmonization

**III. Friedenthal, Miller, Sexton, and Hershkoff, Civil Procedure: Cases and Materials Ninth Edition (Thomson-West, 2005)**

A. Subject Matter Jurisdiction: Noncitizen Defendants and National Policy

1. Page 259, Note 6: Note on 1988 amendments to 28 U.S.C. § 1332(a) that for purposes of diversity jurisdiction “an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.”
2. Page 260, Note 7: Note on whether citizens of Overseas Territories of the United Kingdom, such as the British Virgin Islands, are “citizens or subjects of a foreign state” pursuant to 28 U.S.C. § 1332 (a)(2).
3. Page 260, Note 7: Note raising questions about the contemporary purpose of alienage jurisdiction and citing Johnson, *Why Alienage Jurisdiction? Historical Foundations and Modern Justifications for Federal Jurisdiction Over Disputes Involving Noncitizens*, 21 *Yale J. Int’l L.* 1 (1996); Clermont & Eisenberg, *Xenophilia in American Courts*, 109 *Harv. L. Rev.* 1120 (1996); Moore, *Xenophobia in American Courts*, 97 *Nw. U. L. Rev.* 1497 (2003).
4. Page 260, Note 8: Note on the treatment of stateless persons for purposes of alienage jurisdiction.

## B. Personal Jurisdiction: Noncitizen Defendants, Due Process, and International Harmonization

1. Page 72, Note 8: Note on the effect of the expanding global economy on efforts to define an international law of jurisdiction. The Note briefly compares civil-law approaches to personal jurisdiction with that of the United States but also warns that “[i]n this area of law, differences among civil-law countries are as great as differences between given civil-law and common law countries.” De Vries & Lowenfeld, *Jurisdiction in Personal Actions—A Comparison of Civil Law Views*, 44 *Iowa L. Rev.* 306, 344 (1959).

2. Page 72: Principal case treatment of *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102 (1987). Note 4, following on page 125, asks the student to consider whether *Asahi* is limited in its application to assertions of jurisdiction over foreign defendants and, if so, why.

3. Page 159, Note on “Cybersquatting” and *In Rem Jurisdiction*: Among other things, the Note asks the students to consider the relation between *in rem* jurisdiction and the application of United States trademark law to domain name disputes involving foreign entities.

4. Page 173, Note on jurisdiction by consent. This Note discusses *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), and provides a good opportunity to discuss forum-selection clauses as they relate to transnational consumer agreements and other commercial situations.

5. Page 177, Note 2: Note on Federal Rule of Civil Procedure 4(k)(2) and its application to foreign defendants.

## C. Class Actions: Noncitizen Plaintiffs, Group Representation, and Transnational Accountability

1. Page 664, Note on Class Actions from an International Perspective: This long Note discusses developments in England, Germany, and elsewhere regarding aggregative mechanisms and class-action devices to promote a variety of goals including corporate accountability. The Note cites a number of recent treatments of this issue, including: Sherman, *Group Litigation Under Foreign Legal Systems: Variations and Alternatives to American Class Actions*, 52 *DePaul L. Rev.* 401 (2002); and Rowe, *Debates over Group Litigation in*

Comparative Perspective: What Can We Learn from Each Other?, 11 Duke J. Comp. & Int'l L. 157 (2001).

D. Pleading and Discovery: United States Exceptionalism

1. Page 503, Note 2: This Note discusses pressures to adopt a code, and not a notice-approach, to pleading in transnational litigation, citing Hazard, Taruffo, Sturmer & Gidi, Introduction to the Principles and Rules of Transnational Civil Procedure, 33 N.Y.U. J. Int'l L. & Pol. 769 (2001).
2. Page 737, Note: This Note contrasts United States discovery practice from that of other nations, citing Marcus, Retooling American Discovery for the Twenty-First Century: Toward a New World Order?, 7 Tul. J. Int'l & Comp. L. 153 (1999); Subrin, Discovery in Global Perspective: Are We Nuts?, 52 DePaul L. Rev. 299 (2002).

**IV. Case Study: Forum Non Conveniens, Noncitizen Plaintiffs, and Access to United States Courts**

1. Principal case treatment of Piper Aircraft Co. v. Reyno, 454 U.S. 235 (1981).
2. Pages 356-360, Notes 1-12 cover the following issues:
  - Empirical evidence on the increase in forum non conveniens motions in federal court, from seven in 1947 (seeking dismissal in favor of an alternative United States forum) to 97 in 2001 (seeking dismissal in favor of an alternative foreign forum. See Davies, Time To Change the Federal Forum Non Conveniens Analysis, 77 Tulane L. Rev. 309 (2002).
  - Discussion of factors that are contributing to the increase in forum non conveniens litigation, including the comparative advantages of United States courts for foreign litigants; the globalization of international markets; and an increased concern for human rights. The Note cites a number of law review articles, including Van Detta, The Irony of Instrumentalism Using Dworkin's Principle-Rule Distinction To Reconceptualize Metaphorically a Substance-Procedure Dissonance Exemplified by Forum Non Conveniens Dismissals in International Products Injury Cases, 87 Marq. L. Rev. 425 (2004).

- Discussion of the weight to be accorded a domestic or foreign plaintiff's choice of forum, citing *Iragorri v. United Technologies Corp.* 274 F.2d 65 (2d Cir. 2001).
- Discussion of sovereignty concerns and forum non conveniens, citing *Islamic Republic of Iran v. Pahlavi*, 62 N.Y.2d 474 (1984), certiorari denied 469 U.S. 1108 (1985).
- Introduction of whether international tribunals, in which a foreign state, rather than the individual, litigates the alleged injury, should be considered alternative adequate forums for purposes of forum non conveniens analysis. The Note cites *Nemariam v. Federal Democratic Republic of Ethiopia*, 315 F.3d 390 (D.D. Cir.), certiorari denied 540 U.S. 877 (2003).
- Discussion of conditional dismissals of lawsuits on forum non conveniens grounds, citing *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India*, in Dec., 1984, 809 F.2d 195 (2d Cir.), certiorari denied 484 U.S. 871 (1987).
- Discussion of the special considerations raised by human rights litigation in United States courts and the relation of the doctrine to the Alien Tort Claims Act, 28 U.S.C. § 1350, and forum non conveniens doctrine.

